

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
SHATSKY, et al., : Docket #1:18-cv-12355
 : MKV
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 Plaintiffs, :
 :
 - against - :
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 THE PALESTINE LIBERATION : New York, New York
 ORGANIZATION, et al., : July 6, 2021
 :
 Defendants. : TELEPHONE CONFERENCE
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PROCEEDINGS BEFORE
THE HONORABLE JUDGE MARY KAY VYSKOCIL,
UNITED STATES DISTRICT JUDGE

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Proceedings conducted telephonically and recorded by
electronic sound recording;
Transcript produced by transcription service

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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THE COURT: This is Judge Freeman. This should be Shatsky v. The Palestine Liberation Organization, et al., 18cv12355. Let me have your appearances for the record starting on plaintiffs' side.

MR. STEPHEN SINAIKO: Good morning, Your Honor, my name is Steve Sinaiko, I'm with Cohen & Gresser here in New York City, and I am here this morning on behalf of the plaintiffs with at least one of my colleagues.

MR. RONALD WICK: Good morning, Your Honor, this is Ron Wick, also with Cohen & Gresser. I'm in Washington, D.C., also for the plaintiffs.

THE COURT: Anyone else for the plaintiffs? Okay, how about on defendants' side?

MR. MITCHELL BERGER: Good morning, Your Honor, is Mitchell Berger from Squire Patton Boggs for the defendants.

THE COURT: Anyone else on defendants' side?

MR. JOSEPH ALONZO: Good morning, Your Honor, also Joseph Alonzo from Squire Patton Boggs for the defendants.

THE COURT: All right, and is there anyone else who's not introduced him or herself yet? No? I have my law clerk on?

THE CLERK: Hi, Judge, I'm on.

THE COURT: Okay. Is that everybody?

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MR. BERGER: I was expecting my colleague Gassan Baloul to join, but there's no reason to delay getting started if he hasn't.

THE COURT: So I've been looking at the docket on this case and trying to figure out what it is you might need me to do. The reference at the parties' request was quite narrow. It was just to assist in resolving disputes that may come up at depositions with respect to scope of discovery. Who just joined please? This is Judge Freeman.

MR. GASSAN BALOUL: This is Gassan Baloul from Squire Patton Boggs.

THE COURT: I'm sorry?

MR. BALOUL: This is Gassan Baloul from Squire Patton Boggs.

THE COURT: I'm having trouble hearing. Is someone else able to --

MR. BERGER: That's my colleague Gassan Baloul from Squire Patton Boggs for the defendants.

THE COURT: Okay, your connection is not great. All right, so as I was saying, it looks like you were looking for and were granted the services of a magistrate judge, that would be me, to assist in resolving disputes about questions that may be asked at depositions which I gather you have a limited time now to conduct. Maybe some

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have already been conducted, I hope that's the case with time running. But I'm not sure what help you think you're going to need given that you had a fairly lengthy conference with Judge Vyskocil and she gave you guidance with respect to the proper scope of this jurisdictional discovery. So can I hear from counsel as to what you're envisioning my role would be and why you think you need me and when you think you need me, if, in fact, you need Just identify yourself before you speak each time.

MR. SINAIKO: Certainly, you know, it's Steve Sinaiko for the plaintiffs. I think the reason that we asked for a magistrate judge to be assigned to assist with depositions is because the case actually presents some unusual issues of personal jurisdiction under the Promoting Security and Justice for Victims of Terrorism Act, and we also are expecting that the defendants are going to use, are going to assert functional immunity as a grounds, you know, functional diplomatic immunity based on their participation as permanent observers at the United Nations as a reason why some of the witnesses in the case don't need to answer questions that we may pose to them at their depositions concerning activities of the defendants in the United States which are an express element of personal jurisdiction under the statute I mentioned a moment ago.

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So I think the idea was that we wanted to have a magistrate judge who would be able to help us sort out these issues if they come up, you know, as promptly as possible so that the depositions can be completed in advance of the discovery cutoff that Judge Vyskocil had set for us. The depositions, the first of the depositions is set to happen this coming Thursday, that's I think the 8th of July, and then the deposition schedule, just a bunch of issues. The deposition schedule resumes on the 22nd and 23rd of July, and then there are depositions I believe Tuesday through Friday of the following week as well.

So that's the schedule and that's in a high level way the, you know, the nature of the assistance that we anticipate needing, and then I think, you know, the other reason to have a conference call, apart from letting Your Honor know what the schedule was, was to find out how Your Honor would like to address these issues if and when they come up.

THE COURT: Well, first of all, why do you anticipate that you will have problems? And if you think you're going to have problems on certain topics, can you talk about your concerns ahead of time and try to reach agreement on certain key points so that you don't have to be reacting in the middle of a deposition and trying to

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find a judge who may or may not be tied up? Because I have a fairly busy schedule, I have things on my calendar, and I do take calls from depositions when I can. When I can't, I generally tell people, you know, make a record, keep going and reserve it and come back to me as soon as you're able or as soon as I'm able to hear you which might be later in the day, might be at a lunch break, might be, you know, on a written record.

But why do you think you're going to have problems, and if you can anticipate what those problems are going to be, why can't we talk about them or you talk about them with each other ahead of time and see if you can head off the problems?

MR. SINAIKO: Your Honor, Steve Sinaiko again. And I appreciate that. I think one of the principal issues is that the plaintiffs in the case don't actually concede that there is such a thing as functional immunity here, and even if there were such a thing, we don't concede that it applies to these defendants. So in our view this functional immunity argument wouldn't be a basis for the defendants to direct their witnesses to refuse to answer any questions. But obviously the defendants take a different view, and I'm not sure that that's an issue that we're going to be able to resolve in advance of the

1 depositions.

2 Now that said, I mean even with the issue
3 unresolved, to the extent there are --

4 THE COURT: Well, Judge Vyskocil already ruled
5 that defendants can make objections based on functional
6 immunity if they believe that they have a legitimate
7 objection on that ground. She didn't say, she didn't rule
8 there was no such thing and that such objection would be
9 improper. She said the defendants have what they believe
10 to be a legitimate objection under the U.N. whatever it is,
11 headquarters charter, that they can assert those
12 objections. So are you going to be looking to me to make a
13 ruling that there is no such thing and questions have to be
14 answered?

15 MR. SINAIKO: Well, certainly, I mean, you know,
16 obviously we were, you know, we've seen Judge Vyskocil's
17 rulings as well, and while she said that the defendants are
18 free to make objections based on privilege if they think
19 that they have such objections, I don't think that she made
20 a ruling that they are entitled to assert this purported
21 privilege. On the other hand, like I said, I don't think
22 that the issue necessarily will need to be resolved in that
23 direct a way depending on how the questioning unfolds at
24 the deposition. But I mean I think our first position --
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THE COURT: Well, hold on a second, if you are looking for a ruling as to whether a privilege or immunity is being properly asserted, I'm going to have to have a lot more to go on than seat of the pants, someone calling me in the middle of a deposition and saying this question is improper because or this question is proper because or should be answered or should not be answered. I'm going to have to understand what this immunity is, I'm going to have to understand what the argument is as to why it does or does not apply, I'm going to have to understand what you believe the scope of it is. This is not like attorney-client privilege or delivery of process privilege or something we see frequently. This is something that I don't have day to day in my cases.

So do not expect me to make rulings in the middle of a deposition as to whether a privilege is being properly asserted. You're going to have to give me briefing on that if you want, and I don't know that Judge Vyskocil anticipated referring it to me to make that decision.

MR. SINAIKO: I totally appreciate that, Your Honor. It's Steve Sinaiko again. And that was actually the reason that we felt like it would be appropriate to have a conference call with Your Honor in advance of the depositions so that we could discuss a process for getting

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Your Honor whatever briefing she might need so that rulings on these issues can be made in a reasoned way.

THE COURT: Well, did you have the understanding from Judge Vyskocil that she was looking to me to define and rule on the scope of this immunity and its applicability in this case generally? Because, you know, I'm not sure that she had that in mind when you wrote the letter and said, you know, make some rulings during the deposition. You know, if she envisioned your briefing me fully on an issue and my opining on it in an advisory way or otherwise. I mean I realize that cases can be referred to magistrate judges for all discovery matters and to make rulings with respect to all discovery matters, but, again, what you asked for was fairly limited, and I think what the letter sounded like and what she probably envisioned was you have a quick dispute at a deposition, you call up, you each make your pitch, and I try to resolve it and keep you moving along, not that I'd make a ruling that could substantially impact the case in some manner.

MR. SINAIKO: Well, Your Honor, I think it was reasonably clear from the conference with the judge that, you know, with Judge Vyskocil that is, that issues are likely to come up at the deposition will turn on, most of the depositions, will turn on questions of this functional

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immunity. I mean I guess --

THE COURT: She already said that the objections can be made. If defendants believe they have this legitimate objection, they can make those objections to the questions. So if you're asking me to rule or anticipating that there's going to be such an objection made and asking me to rule that it's an improper objection and that the question should be answered, she's already ruled that the objection can be made. Hold on one sec here. Let me get the transcript here. Hang on a second.

(pause in proceeding)

THE COURT: She said, To the extent the defendant has legitimate objection, for example, there's an argument that will be asked, I guess the question will be asked will invade functional immunity under the United Nations Headquarters Charter, if questions get asked that invade privileged areas, object on the record at the deposition. She's already said if, I mean maybe what you're focusing on is it a legitimate objection and you want me to rule whether it's a legitimate objection or not, but that's going, you know, that's - I interpret that - I interpret her comments to mean that if defendants' counsel acting in good faith with their obligation to assert a position that's well founded by law or in their view legitimately

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appropriate as an extension of existing law, if they in good faith believe that they have a basis for objection, it's not going to be sanctionable, it's not going to be frivolous, they have a good faith basis for that objection, they can make that objection on the record at the deposition. I don't think what she was saying was the nuances will be determined by Judge Freeman who will determine the scope of privilege and decide whether each and every objection is a legitimate one or not.

And to the extent you have an argument that no such objections are permissible, no such objections would be legitimate, that's - and so any objection that's made on that ground is going to be an objectionable objection. That's asking a big fundamental question that I'm not sure she envisioned that I would decide. If what you're asking is, look, we think that, to the extent objections are made, they could only even potentially be legitimate if they are XYZ but not if they're, you know, ABC, then you should be discussing that ahead of time. And if there's something narrow that you can put in front of me for guidance and that you can provide me some letters on and some case law support for, I can take a look at it. But if your depositions are starting up real fast, that's got to be put in front of me real fast, and I've got to have a chance to

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look at it real fast.

MR. BERGER: Your Honor, this is Mitchell --

THE COURT: But I'm not going to be making some wholesale ruling, I don't think, that this sort of immunity simply doesn't apply in this case and it's wholly improper.

MR. BERGER: Your Honor, Mitchell Berger for the defendants. If the Court would just give me a few minutes to give you our perspective on this. We come out I think where Your Honor has indicated which is we did brief this in front of Judge Vyskocil. If you look at docket number 66, page 4 where we lay out the authorities on functional immunity in docket number 65 at page 4. So Judge Vyskocil did not address this in a vacuum.

But as importantly what we certainly understood her to say is not only may we make objections, but we may instruct the witness not to answer because otherwise we loose the benefit of the functional immunity. We have some pretty good sense of where the lines are drawn for functional immunity because we have produced calendars from the U.N. Mission. So in terms of when the ambassador - for example, Thursday's the deposition of the Palestinian ambassador to the UN. When he had a meeting, where he had a meeting, how he had a meeting, like whether it was virtual or whether it was in person, those are fair game.

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What was discussed at a meeting, why the meeting took place, that's not fair game under functional immunity. And who the ambassador met with may depend on the circumstances be subject to immunity because who may reveal the what and the why that is protected by functional immunity.

There's very little doubt that functional immunity extends to the Palestinian embassy, the mission to the United Nations. That's in the authorities that I mentioned at docket 65 and 66, and we believe Judge Vyskocil said, fine, make your objections, issue your instructions. If it requires resolution by the court, then, of course, you'll all come back.

So from our perspective this call is helpful to determine how best either Your Honor wants to approach those questions of resolving instructions or if Your Honor thinks that the kinds of issues I've just laid out are better before Judge Vyskocil, then that's helpful as well.

THE COURT: Well, who was it who asked for a magistrate judge to be available, was it plaintiff?

MR. SINAIKO: The parties jointly requested that actually, Your Honor, because they think the parties, based on our own interactions in advance of these depositions, anticipate that there will be disputes as between us regarding the appropriate scope of instructions, you know,

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2 appropriate scope of instructions not to answer. And as I
3 said a moment ago, we have our --

4 THE COURT: Do you anticipate that any and all
5 problems that may arise relate to functional immunity as
6 opposed to anything else like whether the questioning is
7 broader than the relevant prongs of the statute or anything
8 like that? Because I know there were other issues that
9 Judge Vyskocil addressed. Do you think the main or even
10 the only issue where you're going to likely look for
11 guidance is on the scope of this immunity?

12 MR. SINAIKO: My sense, Your Honor, is that the
13 scope of - and this is Steve Sinaiko again for the
14 plaintiffs. My sense is that the scope of this supposed
15 immunity may not be the only issue, but it is likely to be
16 the principal issue, and actually given that privilege logs
17 that have been served on us already, we think that it's
18 going to be a substantial issue because --

19 THE COURT: Well, I'm likely to rule that
20 defendants should think twice and three times about making
21 the objection and instructing a witness before doing so to
22 make sure you are confident that you believe you're on
23 solid ground and can support that objection and with good
24 case authority if called upon to do so afterwards. And if
25 you believe that you can and you believe you're on solid

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ground, make your objection, make your instruction. It'll be on the record and continue on with the deposition. It seems to me that that's what Judge Vyskocil envisioned and that's what I would be inclined to enforce.

 If there's something that really looks like it's a frivolous objection, that there really is no basis for it in the case law, defendants are cautioned that you may have to be bringing back a witness again. You may be sanctioned for making frivolous objections. You know, you need to really think it through. But if you think the parameters are fairly clear, you think you've got a good faith basis for asserting it, assert it, put it on the record. And if the objection, if with the objection you believe the case law would support your instructing the witness not to answer, then make the instruction, put it on the record, but be prepared to support your actions down the road if called upon to do so because invariably, it sounds like, you're going to be called upon to do so.

 MR. BERGER: Your Honor, Mitchell Berger for the defendants. We hear that, and part of the reason why I'm trying to be transparent about both what we've said before about functional immunity and how we intend to apply it is because we do believe it's on solid ground. But Your Honor can appreciate any privilege or immunity that if we don't

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protect the what did you discuss and why did you discuss it, then the privilege is lost. So we feel very strongly we have a good faith basis. We think the law supports us. We are trying to draw --

THE COURT: By the way, is it an absolute or is it a qualified immunity?

MR. BERGER: Well, functional immunity is by its nature qualified in this sense that the language coming out of the UN's legal secretariat is that the scope of immunity relates to words spoken and deeds done, and I'm quoting here from material we have put before Judge Vyskocil, quote, "In the exercise of the observer function," so the Palestinian Mission to the United Nations is an observer mission. So, so long as the conversations were held in the exercise of the observer function, then we're quite confident that functional immunity applies. We are not asserting, to be clear, diplomatic immunity which would be absolute under the Vienna Convention, and so this is a question by question, answer by answer assertion of functional immunity.

But if I could return to Your Honor's question, I do think there's a potential for other objections in terms of scope because, as Your Honor knows, Judge Vyskocil said in her order of April 29, docket number 80, that not only

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is discovery limited to the jurisdictional bases, but she said expressly in the April 29 transcript at page 23, everything else is off limits. So until we hear their questions, we don't know whether there will be other scope objections. And there are other depositions coming up later where there may be scope objections.

Perhaps, Your Honor, I could make a suggestion to the Court which is we're trying to be transparent, here's where we're going to make our objections, here's where we'll issue our instructions. We'll get through the morning session on the 8th with the U.N. ambassador. If the parties think it would be beneficial to speak with Your Honor, perhaps during the lunch break at that deposition and Your Honor has time to hear us on the 8th somewhere around the lunch time, perhaps we can call and get some additional guidance. If not, we'll have to deal with it some other way.

THE COURT: All right, my schedule on the 8th is as follows: As of now, but that may well change, my morning is fairly clear, and the reason I'm saying it may well change is because I had to move some things off of another morning, and I'm looking for a place to reschedule them and they may end up there. My lunch time is usually, in terms of whether I have conferences scheduled, between -

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not necessarily whether I'm eating - between 1 and 2. Usually my scheduling allows for a break between 1 and 2. Certainly on the 8th my guess is 12:30 to 2 is relatively clear. Two o'clock I have a conference that is likely to be lengthy and somewhat intense, and so I will probably not be available from 2 to at least 3 and possibly 4. Okay.

So the end of the day on the 8th I could also be available, you know, if you wanted to hold something and give me a call at the end of the day, maybe after 4. That's a little iffy. If you try me and I'm tied up, I'll be tied up.

I don't know if I'll be in chambers that day or not. We're also scheduled that day to have a computer upgrade in chambers which means the IT people will be swarming around, taking away our computers and replacing them. And we were - I don't know if that's really going forward on that day. It was - it was scheduled for that day. They might shift it. But anyway, if that happens, not only - I may end up working remotely that day because if I need a computer, I may be better off if I'm actually home than if I'm in chambers. So there's that going on in my chambers on that morning.

So if you need something, you can try in the morning. You can certainly try around lunchtime. What you

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can do is you can call my chambers, and if no one answers, it's because we've all run away from the IT people to try to find another place to work. You can just leave a voicemail in chambers. A voicemail in chambers will kick to my email, it will pop up, I will get it. Okay? Leave a phone number where you can be called back, and I will get back to you if need be as long as I can. Once we hit 2 o'clock on that particular day, I'm going to be underwater for at least a couple of hours. Okay?

Picture during this call someone suddenly calls in from a deposition, I say, oh, sorry, I gotta run, and then I'm tied up for however long and leaving you all hanging. If it's something, if I'm in the middle of a settlement conference, if I'm in the middle of - and we just lost somebody. Do we still have plaintiff's counsel?

MR. SINAIKO: Steve Sinaiko, I'm still here, Your Honor.

THE COURT: You still have someone speaking on defendants' side?

MR. BERGER: Yes, Your Honor, Mitchell Berger.

THE COURT: Okay, we may have lost one of your colleagues, but hopefully whoever dropped off will call back.

Let me look at my calendar for the other days that

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you mentioned, and, by the way, with respect to other sorts of scope issues, for example, whether the questions relate to the prongs of statute that are issue here on jurisdiction or relate to other things when Judge Vyskocil had said the depositions are limited to these categories that are in the statute and the bases of the asserted jurisdiction in this case under that statute and that everything else is off limits.

I'll flip my warning to plaintiff on this. I've already cautioned defendants that if they're going to object, they better think a few times about it and make sure they're comfortable that they're on solid ground. If you're going to ask a question and defendants said, wait, that's outside the scope of the statute and the prongs of the statute that are at issue here, asserted basis for jurisdiction, and Judge Vyskocil has said something outside the scope of that is off limits, be confident that the question you're asking can be justified as being within that scope directed toward that prong, whichever one it is, of the statute. And if you can't make that argument with a straight face and feel that it's well supported, do not be asking that question. Because, again, she already gave you guidance on that, and I expect you, just like I expect defendants, to adhere to the guidance she gave you. Okay?

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2 Let me look at my calendar. Tell me again what
3 the second date is for depositions.

4 MR. SINAIKO: So we have the 8th with Mr. Mansour
5 and then on the - he's the Permanent Observer of the
6 Palestine Liberation Organization to the United Nations.
7 On the 22nd and 23rd we have depositions scheduled of two
8 other people who work at Permanent Observer Mission to the
9 United Nations here in New York and then the following week
10 --

11 THE COURT: The 22nd and 23rd - I mean the farther
12 out you go, the more room there is in my calendar. As it
13 gets closer to the day, it tends to fill up more. So what
14 I will do is for each of those days, the 22nd, 23rd. I will
15 ask my deputy to carve out from 12 to 2 a space, not to
16 schedule anything at 12, to make sure that I have
17 availability from 12 to 2 on the 22nd, the 23rd, and then the
18 following week which days?

19 MR. SINAIKO: So I believe and Mr. Berger can
20 confirm that we're scheduled to proceed Tuesday through
21 Thursday of the following week. So that would be the 27th
22 to the 30th of July.

23 MR. BERGER: Your Honor, Mitchell Berger. I can
24 confirm that that's going to be easier and those
25 depositions are not going to involve functional immunity

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but they will involve scope issues. But because the witnesses will be testifying virtually from the Middle East and each of the two 30(b)(6) designees will be testifying over a two-day period from 7:30 in the morning eastern time till 11:30 in the morning eastern time, there it would be convenient I would think in between day one and day two, given that the entire east coast afternoon is available, to speak to you on perhaps the Tuesday midday and the Thursday midday of that week which I think is the 27th and the 29th of July.

THE COURT: All right, the --

MR. SINAIKO: That's probably right.

THE COURT: So if you're looking for a block of time, on the 27th, again, if it would be helpful, I could block out 12 to 2. On the 29th I already have something scheduled at 12, but I could hear from you probably from 1 to 2.

MR. SINAIKO: Right, Your Honor, it's Steve Sinaiko. There is - I agree with Mr. Berger that we don't anticipate significant difficulties around the depositions to which he was referring a moment ago, the 30(b)(6) witnesses who are going to testify from the Middle East. And to the extent there are issues with those depositions, the schedule makes it easier for us to address them with

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Your Honor. There is the possibility, it's not, you know, it's not set in stone, but there is scheduled currently another deposition on the 30th that might be double-tracked with the second half of one of the 30(b)(6) witnesses, and that is a deposition that, if it proceeds, would involve the same issues as, you know, the immunity that we've been discussing.

THE COURT: Right now my most heavily scheduled day is the 29th, and I have a doctor's appointment in the afternoon of the 28th. I don't think you were looking for the afternoon of the 28th. So the afternoon of the 27th as of now it's okay, and like I said, I can carve out 12 to 2 for you. The 29th I could carve out 1 to 2, and the 30th I could do 12 to 2 if that's helpful if you have something double-teamed on the 30th.

MR. SINAIKO: Your Honor, I think that's perfect from a scheduling perspective.

THE COURT: All right, so let's back it up. Let me just jot down all the dates. The 21st was it and the 23rd, 22nd and 23rd?

MR. BERGER: 22nd and 23rd, Your Honor.

THE COURT: 22nd and 23rd I'll try to block out 12 to 2. I'll try to block out 12 to 2 every day except the 29th where I already have something at 12. Okay? And for

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this coming, for this next, for the deposition that's next up is this coming Thursday, the 8th, I'll try to block out again 12 to 2. I'll try to block out 12 to 2 every day except for that one day when I already have something at 12. Okay? Which is the 29th. All of the other days I'll try to carve that out for you to call in if you need to.

But just temper your expectations about what kind of rulings you'll be able to get from me. I mean I do handle rulings, I do handle disputes from depositions when they occur, and I try to make rulings. Sometimes my rulings are make your record, you know, sometimes that's the way that I resolve it. Sometimes it's that question is confusing, you should reframe it or, you know, stop making speaking objections or, you know, the kinds of things people call me, they say somebody's being harassing or whatever, I lecture people.

But be prepared to have the court reporter read back to me a particular question, a particular answer, and just understand that most likely I'm going to look to you to tell me with straight faces that you have a good faith and you believe sound basis for asking a question because you believe it is geared to one of the prongs of the statute at issue. And you have a good basis on the other side for asserting immunity and you have case law to

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support it, and the case law would also support the instruction, you know, in which case I'm going to say make it, put it on the record.

So there may be issues around the edges where I make specific rulings and say yes or no on a particular question or a particular response, but more likely I'm going to be looking to you to look carefully at what Judge Vyskocil ruled already and adhere to it.

And I'll touch base with her and see if we can put our heads together about our expectations are about this immunity. If she says I would actually like it if you would look at the broader question of the immunity and, you know, make broader rulings on it, then I will do so. I just have some doubt that that's what she had in mind. But if she does, then I will get back to you, probably through my clerk who's on this line, and ask you for some briefing. Okay?

MR. BERGER: Thank you, Your Honor. This is Mitchell Berger for defendants. Just one other thought in advance of what I'm sure inevitably will be a call to you on Thursday which --

THE COURT: By the way, you do not have to call me. If the period from 12 to 2 comes and goes and I don't hear from you, do not feel that you're letting me down or

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that you're violating some court order that you must call me. You do not have to call me. I would welcome a lack of calls.

MR. BERGER: Well, Your Honor, speaking for the defendants, we would welcome not having a call as well because we've, as I said, tried to be transparent about how we're going to approach this and what instructions we're going to issue. So we're not going to be looking to call.

But I just wanted to lay one other thought out for the Court in advance of potentially hearing from us on the 8th which does actually affect how what may be a series of questions get asked and whether they raise immunity or even whether they need to be answered, which is the focus of the questioning here is whether the defendants have engaged, according to the language of the statute, in any, quote/unquote, "any activity." So to the extent the same question is asked a hundred times about a hundred different types of activity, regardless of the immunity issue, there comes a point where enough is enough.

I don't expect Your Honor to rule on that. I'm just saying that in terms of what happens is Mr. Sinaiko says we've saved up 20 template questions, they all ask the same thing, I don't think we need Your Honor to be resolving the question on all 20. These are, you know,

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when Judge Vyskocil said the jurisdictional predicates, one of those jurisdictional predicates is the word any, even so it becomes a question of what becomes cumulative.

THE COURT: Look, I'm not sure this is what you're saying, but if there are numerous questions and responses that are all of a piece, that all follow the same kind of pattern, the argument is the same on all of them, you certainly don't need to raise all of them with me, and you should take whatever answer I give you and extrapolate with respect to others that are similar. I'm not sure if you're saying something other than that.

MR. BERGER: Your Honor, I think that's obviously very helpful guidance and that is part of what I'm saying. The only other thing that I'm saying is that sometimes if there is a tough nut to crack on immunity but it's cracked in a way that supports the immunity instruction, then I guess what I am saying is what Your Honor is saying, that we'll extrapolate from there. But I hope the plaintiffs --

THE COURT: I don't know what that means. I don't understand, without a concrete example I don't know what you're talking about.

MR. BERGER: All right, well, let me there to be as concrete as possible. We have produced calendars for the ambassador and the deputy ambassador to the U.N. Each

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of them has well over a hundred line items. We've also produced a privilege log for the ambassador and the deputy ambassador concerning meetings, and they probably have well over 200 line items. It seems to me needless to go through every one of the line items in the calendar regardless of the immunity issue if the goal here is to prove that the defendants have engaged in, quote/unquote, "any activity" falling under the statute. We know from the plaintiffs' briefing that they're focused on things that don't raise questions of private conversations. They're focused, for example, on addresses the ambassador made to various universities.

And so to consciously try to invade the privilege in private conversations I guess my point is is that is a reason to respect the privilege when they don't need to go there in order to do what Judge Vyskocil told them to do which is focus on the jurisdictional predicates.

THE COURT: Well, look, I gather these are all plaintiffs' depositions, plaintiffs are taking these depositions or is it some on each side?

MR. BERGER: No, you're correct. Mitchell Berger, Your Honor, that's correct. These are jurisdictional discovery depositions. They're all plaintiffs' --

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THE COURT: So plaintiff is taking these depositions. So, plaintiff, you have a certain number of hours for these depositions. You may not get the witnesses back again. If there are objections and they come back to the Court afterwards and you say we need you to rule specifically on these objections and if you overrule them, we need to have the witness back, the Court may say no. So you have to look at the time that you have and use it wisely, and if you spend a large portion of your time going into areas where you're getting objections and you're getting frustrated and whatever, think about is there something else I better be doing with my time as well or instead of this where I'll get testimony, where I'm assured of getting testimony or the testimony may be usable on the issue of jurisdiction. So if there is something that is public on which they would not, certainly not be immunity even if immunity is available and that would be useful territory, maybe make sure you spend some of your time on that because think of every deposition as this may be your one shot at it for the jurisdictional discovery and you may not get, you may but you may not get the witness back again. All right? So --

MR. SINAIKO: Your Honor, it's Steve - oh, I apologize.

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THE COURT: No, no, I'm sorry, I'm probably just repeating myself here. Go ahead.

MR. SINAIKO: It's Steve Sinaiko, and we certainly appreciate that guidance. I think our concern around these issues is that we're going to be precluded by instructions from probing the basis for the privilege assertions in a way that would allow us to build a record that the privilege doesn't apply if it exists at all. So -
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THE COURT: Well, any and all privilege questions, and I think I heard this from defendant, I don't think they would disagree with this, there are going to be certain foundational questions to establish whether or not something is legitimately privileged. Even attorney-client you can ask who the people were who were having the conversation and whether there was anybody else in the room at the time, you know, and general subject matter. Just like on a privilege log, you're supposed to identify general subject matter without revealing the content of the advice requested or advice given.

There are certainly questions that will help establish whether there is or is not a ground for an immunity objection. And I'm assuming defendants recognize that there are such questions and will allow such questions

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to be answered.

So I mean I don't know exactly what is needed here in order to trigger this privilege. You already know what the person's job was, what the role was, you know, whether something was spoken within that role if that's part of the test. Then you have to answer the questions that would enable the parties and the Court to determine whether it's privileged or enable you to argue that it is, would enable plaintiffs to argue it is not, and to enable the Court to determine who's right.

So I don't expect anything and everything surrounding a meeting, for example, to result in an instruction. I only - and I think defense counsel already said this, that they feel that there's a line.

MR. BERGER: For defendants, Your Honor, Mitchell Berger again. Yes, we hear that loud and clear and we're trying to not only draw those lines appropriately but to be transparent about where we're drawing those lines.

MR. SINAIKO: Your Honor, it's Steve Sinaiko for the plaintiffs. If the depositions unfold as Your Honor is suggesting, that should be fine.

THE COURT: All right, look, your goal, I would say your mission but that sounds like it might be a pun, your goal should be to proceed without need for calling me.

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That's ideal. What that means is you're working well together and cooperatively together, you're trying to work through issues on your own before you raise them with me and you're successfully making your positions clear and the things that you think are important and building your records.

And I'm not sure how well you've been working together in this case. It seemed to me from taking a look at the transcript of the conference before Judge Vyskocil that she may have had the sense that you weren't working all that well together. I think she suggested at one point you put things in writing because you weren't able to talk with each other. Am I remembering that correctly?

You need to be able to confer fully in good faith about any and all discovery disputes before raising them with the Court, including an issue that comes up at a deposition, you go off the record, you talk about it, you confer fully, you see if you can resolve it, you see if you can narrow it, you see if you can work around it to some extent. You see if, you know, you say what if I ask a background question on this, would that get us somewhere. You see if you can - do it as much as you can do without running into problems before you reach a point where you are really at impasse on some issue and you need the

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Court's intervention. All right, I enforce the good faith conference requirement, and I don't see why a dispute that arises at a deposition should be any different from any other discovery dispute in terms of that good faith conference requirement. All right?

MR. BERGER: Your Honor, Mitchell Berger for defendants. We hear you loud and clear. I think things have taken a dramatic shift since the April 29 conference with Judge Vyskocil. I think we've been able to confer in good faith about a number of issues, and I expect we may be able to do so here and toward that end that's why I've tried to be transparent both with the Court now and with plaintiffs as well in advance about where we're going to be drawing the lines. So other than not knowing their questions, we have no secrets about where our objections and instructions are.

THE COURT: All right. Go carry on and I expect you'll be able to work together. I see no reason why you cannot. And, you know, you have to have a little trust in the other side too that if they're tell you they have a good faith basis for something and that they believe they can support it, on either side, that, okay, they're counsel, they say they've got a good faith basis for something, they say they believe they can support it if

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push comes to shove and there's a later motion made, move on, make the record, move on. And if you're really at that's ridiculous, that's frivolous, how could you do that, that's well outside what Judge Vyskocil said, you know, how can you even say that and you're just going at it like this, that's not good faith conference, that shouldn't be happening. If something really degenerates and you really can't get anywhere and you really think it's critical, then you get in touch with me and I will make myself available and try to help you as best as I can in that moment. All right?

MR. SINAIKO: Your Honor, it's Steve Sinaiko. We certainly always make every effort to work in good faith with the defendants, and it's certainly not our goal to need to involve you with the depositions, but, you know, to call you from the depositions --

THE COURT: There should be very little reason for you to call me given the guidance you've already had both from Judge Vyskocil and from me. There really should be very little reason - most depositions go forward without calling judges. So you should be able to do it. If you really need me, you have times blocked out when you can contact me. Okay?

MR. SINAIKO: Your Honor --

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MR. BERGER: Thank you, Your Honor.

MR. SINAIKO: -- we appreciate it.

THE COURT: All right, you're welcome. Take
care, everybody.

MR. SINAIKO: Thank you for your time today.

THE COURT: All right, bye bye.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Shatsky et al v The Palestine Liberation Organization et al, Docket #18-cv-12355-MJV, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: July 12, 2021